

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 62761-9-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
MICHAEL J. HARRIS,	)	
	)	
Appellant.	)	FILED: March 15, 2010
	)	

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Appelwick, J. — Harris appeals his convictions for driving while license suspended in the first degree and attempting to elude a pursuing police vehicle. Harris contends that the State failed to meet its burden to prove that the 2006 revocation of his driver's license comported with due process. But, revocation of Harris's driver's license was mandatory, and under established case law the procedures for mandatory revocation based on Harris's convictions provided sufficient due process. Harris also contends that the trial court erred in denying his motion for a new trial based on his claim of ineffective assistance of counsel. The trial court did not abuse its discretion in finding that Harris was not prejudiced by counsel's failure to present evidence that Harris was not the registered owner of the car he was driving and denying his motion for a new trial.

We affirm.

## FACTS

Michael Harris was charged with attempting to elude a pursuing police vehicle and driving while license suspended in the first degree. The charges arose from an incident on April 28, 2008, when Trooper Grant Slish observed a truck with multiple equipment violations and initiated a traffic stop.

Prior to trial on the current charges, Harris moved to dismiss the driving while license suspended charge on the ground that the State did not meet due process notice requirements when it revoked his license in 2006. The trial court denied the motion to dismiss.

At trial Trooper Slish testified that he activated his emergency lights and began to follow Harris, who was driving northbound on A Street in Auburn, Washington. As Harris approached 23rd Street, he was immediately behind a sport utility vehicle (SUV). As Harris turned onto 23rd Street, he passed the SUV using the gravel shoulder of the single lane road and sped away, driving 35 to 40 m.p.h. The roadway was rough with potholes and broken concrete. Trooper Slish did not think the speed limit was posted, but assumed it was 25 m.p.h., because it was a residential area. Trooper Slish activated his siren as they approached the uncontrolled intersection at 23rd Street and D Street. Harris turned onto D Street and then turned left back onto 23rd Street. He continued to drive fast and erratically through the narrow residential streets, slowing down only enough to make turns and cutting the corners on the turns.

Harris drove through a stop sign at 23rd Street and F Street without stopping. He sped up to approximately 40 m.p.h., which appeared to be the fastest the truck would go. Trooper Sligh saw that the truck was leaking gas, which he testified was very dangerous. Harris drove straight through the intersection at 25th Street and F Street at 40 m.p.h. without stopping or even slowing down. At that intersection, without stopping, it was impossible to see if any vehicles were approaching from the right. At the next intersection at 27th Street, Harris turned left, cutting in front of an oncoming car without stopping or even slowing down. The pursuit continued until Harris stopped his truck in a driveway off H Street. In total the pursuit covered .8 miles and lasted for a few minutes. Harris exited his truck, looked toward Trooper Sligh, and ran onto a porch and then into a house. Trooper Sligh chased Harris onto the porch, and then into a bedroom, where after a struggle he arrested and handcuffed Harris.

A bumper sticker on the truck read, "Are ya gonna COWBOY UP or just lay there and bleed." During rebuttal argument, the prosecutor referred to the bumper sticker and to the gas leak and argued they were evidence of Harris's reckless intent.

The jury found Harris guilty as charged of attempting to elude a pursuing police vehicle and driving while license suspended in the first degree. Harris filed a motion for a new trial, alleging his counsel was ineffective in failing to present evidence that Harris was not the licensed owner of the truck and failing to address the evidence of the gas leak and the bumper sticker. Defense

counsel filed an affidavit stating that he failed to notice the words on the bumper sticker until the State's rebuttal argument, that he failed to question Trooper Sligh about who was the registered owner of the car, and that there was no tactical reason for the failings. The court denied the motion for a new trial, ruling that any deficiency in defense counsel's performance was not prejudicial, because the alleged deficiencies related to collateral matters and the other evidence of guilt was overwhelming.

Harris appeals.

## DISCUSSION

### I. Notice of Driver's License Suspension

On April 14, 2006, the Department of Licensing (DOL) sent Harris a driver's license revocation notice by certified mail at his address of record in Auburn. The notice provided that on May 14, 2006 Harris's driver's license would be revoked for seven years as a habitual traffic offender and permitted Harris to request a hearing to contest the revocation if he returned the hearing request form postmarked no later than April 29, 2006.<sup>1</sup> The mail carrier unsuccessfully attempted delivery on April 15th and April 22nd. The notice was marked "unclaimed" and returned to the DOL on May 2, 2006. Harris contends that the State failed to meet its burden to prove that this revocation of his driver's license comported with due process.

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<sup>1</sup> The scope of the hearing would be limited to whether the DOL's record of Harris's convictions showed the requisite number of violations within the prescribed period of time. RCW 46.65.065(3).

Because a driver's license is a property interest, due process requires that before it may be revoked the State must provide the licensee with notice and an opportunity to be heard appropriate to the nature of the case. State v. Nelson, 158 Wn.2d 699, 702–03, 147 P.3d 553 (2006). The notice must be reasonably calculated, under all the circumstances, to apprise the driver of the pendency of the revocation. Id. at 703. But, actual notice is not required. Id. (“[d]ue process does not require that a property owner receive actual notice before the government may take his property”) (alteration in original) (quoting Jones v. Flowers, 547 U.S. 220, 226, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006)). The State bears the burden of proving that the license revocation complied with due process. Id. Our review of a due process challenge is de novo. City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

In Nelson, the driver's license was administratively revoked for failure to take a breath test when he was stopped for driving under the influence. 158 Wn.2d at 701. The DOL sent a notice of revocation by certified mail to Nelson's address of record, a residence in Kirkland. Id. At the time Nelson was in custody at the King County North Rehabilitation Facility (NRF). Id. The revocation was effective three days after Nelson was released. Id. at 701–02. One day after the effective date, the notice was returned as unclaimed. Id. at 702. The State argued that the notice satisfied due process, because it followed the statutory requirement by sending notice by certified mail to the driver's address of record. Id. at 703. The court agreed with Nelson that statutory

compliance does not preclude an as-applied procedural due process challenge. Id. But, the court concluded that under the circumstances, the notice was sufficient to satisfy due process. Id. at 705. The court noted that the DOL did not know the notice it sent was ineffective until after the suspension was operative. Id. The court further noted that, because the NRF is a temporary facility, the DOL was not on notice that Nelson would still be at the NRF when it sent the notice to Nelson's address of record. Id. In addition, by the time the DOL learned Nelson did not receive the notice he had already been released from the NRF. Id. The court concluded that the DOL's failure to take additional steps to put Nelson on notice was reasonable, that the DOL was not required to track down Nelson once he was released from the NRF, and that such an open-ended search for a new address imposed too great a burden on the DOL. Id.

Like Nelson, Harris concedes that the DOL complied with the notice statute, but he argues that to comply with due process, the DOL was required to take additional steps when it learned the notice was returned. Harris points out that unlike Nelson, the DOL knew two weeks before the May 2006 revocation date that the revocation notice it sent to Harris was undelivered.

But, we need not determine whether the DOL was required to take additional steps, because revocation of Harris's driver's license was mandatory upon his earlier convictions for attempting to elude, and under City of Redmond v. Bagby, 155 Wn.2d 59, 117 P.3d 1126 (2005), the procedures for mandatory revocation based on a criminal conviction provide sufficient due process.

In Bagby, 155 Wn.2d at 61–62, the court addressed a procedural due process challenge brought by individuals whose driver’s licenses were suspended/revoked upon conviction of certain criminal traffic offenses, including reckless driving, driving while license invalidated, and vehicular homicide. In each instance, the driver’s license was mandatorily revoked upon the conviction, the driver was subsequently charged with driving with a suspended/revoked license, and the driver moved to dismiss the charge on the ground that the DOL did not provide a presuspension or postsuspension hearing. Id. The court noted that the challenge would include any statute that requires the DOL to revoke a driver’s license for a certain period of time after a conviction, including driving while license suspended and eluding police. Id. at 61 n.1. The court applied the three part balancing test of Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), and concluded that the procedures for mandatory revocation based on a criminal conviction provided sufficient due process. Bagby, 155 Wn.2d at 63–66. First, consistent with prior cases, the court concluded that a driver’s license is a substantial private interest. Id. at 63. Second, the court concluded that there was minimal or no risk that a criminal defendant would be erroneously deprived of his driver’s license, because the criminal proceeding that resulted in the conviction provided sufficient due process protections. Id. at 63–64. Third, the government’s interest in keeping those who are convicted of criminal driving violations off the road is significantly greater than those who failed to resolve traffic infractions.<sup>2</sup> Id. at 65–66. See

Moore, 151 Wn.2d at 677 (distinguishing between drivers who had their license suspended in an effort to effectuate resolution of traffic tickets and those who are habitual offenders).

Here, Harris was convicted of attempting to elude a pursuing police vehicle in 2001 and twice in 2005. Because Harris had three convictions for eluding within five years, he was a habitual offender. RCW 46.65.020. The DOL was required to classify Harris as a habitual traffic offender and revoke his driver's license for seven years. RCW 46.65.020(1)(h), .070. And, at sentencing on the attempting to elude convictions, the court was required to revoke Harris's driver's license and mark it as such. RCW 46.20.270. Revocation of Harris's driver's license was mandatory, and, as in Bagby, the procedures for mandatory revocation based on Harris's convictions provided him sufficient notice of the revocation to comply with due process.

## II. Ineffective Assistance of Counsel

Harris contends that his counsel was ineffective in failing to address prejudicial evidence, specifically Trooper Sligh's testimony that the gas leak in the truck Harris was driving was dangerous and the prosecutor's reference during rebuttal argument to the bumper sticker on the truck. Harris argues that his attorney failed to present evidence that Harris was not the registered owner of the truck, and that the failure was prejudicial in light of the State's argument

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<sup>2</sup> Harris is such an individual. Between 1994 and 2006, Harris was convicted of driving with license suspended twelve times, and five of those convictions were for driving with license suspended in the first degree. Between 1995 and 2006, Harris was convicted of at least eight felony offenses requiring license suspension, six of which were for eluding.



that the gas leak and bumper sticker were evidence of recklessness.

To prove his claim of ineffective assistance of counsel, Harris must demonstrate both that trial counsel's representation was deficient, i.e., that it fell below an objective standard of reasonableness considering all the circumstances, and that the deficient performance was prejudicial, i.e., that there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Courts apply a strong presumption that counsel's representation fell within the wide range of reasonable assistance. McFarland, 127 Wn.2d at 335; State v. Thomas, 109 Wn.2d 222, 226, 749 P.2d 816 (1987). In applying this two-part test, the court need not consider whether counsel's representation was deficient if the court can say that the defendant was not prejudiced by the alleged deficiency. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). When ineffective assistance of counsel is raised in the trial court in a motion for a new trial, we review the trial court's decision for an abuse of discretion. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999) (decision to grant or deny a new trial based on ineffective assistance of counsel will not be disturbed absent manifest abuse of discretion).

The jury was instructed that to find Harris guilty of attempting to elude a pursuing police vehicle, it must find, in addition to other elements of the offense,

that Harris was signaled to stop, he willfully failed to do so, and while attempting to elude the pursuing police vehicle he drove in a reckless manner. As Harris acknowledges, the primary issue for the jury on the eluding charge was whether Harris drove recklessly. Trooper Slish's testimony about the gas leak was primarily directed to explaining why Harris did not travel faster than 40 m.p.h. despite his apparent effort to get away. And, the State's reference to the bumper sticker during closing argument was primarily directed to Harris's intent:

And I think we have to talk about what he was driving. I know this is kind of silly, probably a little embarrassing and it's just a bumper sticker and maybe it means something or maybe it doesn't, so take what you want from it. But it says here, are you going to cowboy up or lay there and bleed.

The defendant wasn't going to lay there and bleed. He wasn't going to take responsibility for driving with a suspended license, pull over to the side and stand up to that. No, he was going to cowboy up. He was going to get her done and do whatever it took to get away from Trooper Slish. . . .

And keep in mind that these two, of course don't go to the reckless driving but they go to his intent.

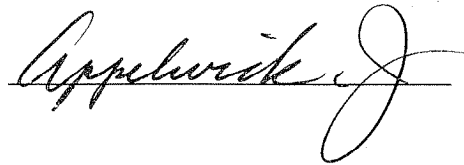
In short, the condition and appearance of the truck had little to do with whether Harris drove recklessly.

Moreover, the evidence of Harris's reckless driving was extensive. While attempting to get away from Trooper Slish, Harris drove erratically on narrow streets through a residential area at speeds up to 40 m.p.h., cutting corners as he turned. In a matter of minutes, he passed a car by driving on the rough pavement of the shoulder, blew through several intersections without stopping or even slowing down, including at least one intersection controlled by a stop sign,

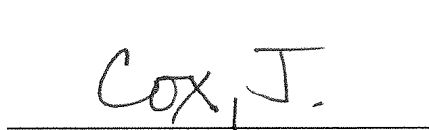
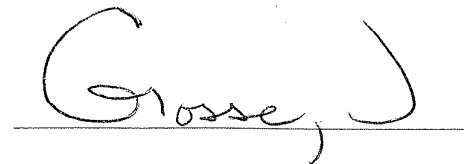
and turned left in front of oncoming traffic without slowing down.

In denying Harris's motion for a new trial, the trial court found that Harris was not prejudiced by any alleged deficient representation, because the evidence of the gas leak and the argument based on the bumper sticker related to collateral matters and the other evidence of guilt was overwhelming. We find no abuse of discretion.

Affirmed.

A handwritten signature in cursive script, reading "Appelwick, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, reading "Cox, J.", written over a horizontal line.A handwritten signature in cursive script, reading "Grosse, J.", written over a horizontal line.